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No. 97-2024

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ARTHUR CALDERON, Warden of the California State Prison at San Quentin, *Petitioner*,

v.

DOUGLAS DANIEL CLARK, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF ADVISING COURT OF SUBSEQUENT DECISION BY NINTH CIRCUIT (RULE 15(8) OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES)

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
KEITH H. BORJON
Supervising Deputy Attorney General
ROBERT S. HENRY
Deputy Attorney General
Counsel of Record
300 South Spring St.
Los Angeles, CA 90013
Telephone: 213 897-2257
Fax: 213 897-2263
Counsel for PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997
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ARTHUR CALDERON, Warden of the California State Prison at San Quentin, *Petitioner*,

v.

DOUGLAS DANIEL CLARK, *Respondent*.

INTRODUCTION

Petitioner Arthur Calderon hereby files this Supplemental Brief to alert this Honorable Court to two published Orders by the Ninth Circuit, in the case of Robert Edward Stansbury v. Arthur Calderon, No. 98-99004 (USDC No. CV 95-8532-WMB), an appeal case, and in the case of Calderon v. U.S.D.C. (Stansbury), No. 98-70733 (USDC No. CV 95-8532-WMB), a mandamus action. In these Orders, the Ninth Circuit Court of Appeals again, as in the instant case, 1) declined to apply the collateral order appeal doctrine of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) to the jurisdictional question of whether litigation can proceed where the state prisoner has actually disavowed a federal petition for writ of habeas corpus filed on behalf of a state prisoner under 28 U.S.C. § 2242, and, in the mandamus action, 2) stated that the question of whether a petition is legitimate at all can easily be determined after all of the time and expense of litigation. The Orders, which are fully discussed below, is attached hereto as Supplemental

Appendices R and S.[1/] The state prisoner's purported verification, wherein he disavows a major portion of that petition, is attached hereto as Supplemental Appendix T.

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1. Petitioner's petition for writ of certiorari was accompanied by an Appendix containing appendices A through Q.

ARGUMENT

THE NINTH CIRCUIT HAS ISSUED TWO NEW PUBLISHED ORDERS REITERATING ITS VIEW THAT THE QUESTION OF WHETHER A HABEAS CORPUS PETITION HAS BEEN "AUTHORIZED" BY A STATE PRISONER IS NOT SUBJECT TO THE COLLATERAL ORDER APPEAL DOCTRINE AND NEED NOT BE RESOLVED BEFORE ALL OF THE TIME AND EXPENSE OF LITIGATION

Rule 15 of the Rules of Court of the Supreme Court of the United States states:

> 8. Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing. A supplemental brief shall be restricted to new matter and shall follow, insofar as applicable, the form for a brief in opposition prescribed by this Rule. Forty copies shall be filed, except that a party proceeding in forma pauperis under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The supplemental brief shall be served as required by Rule 29.

At the time of the filing of the instant petition, the instant case represented the only known instance wherein the Ninth Circuit had ruled that the jurisdictional question of whether a petition for writ of habeas corpus

by a state prisoner filed under 28 U.S.C. §2242 has been properly authorized IS NOT SUBJECT TO the collateral order appeal doctrine.

As petitioner Arthur Calderon stated in his petition for certiorari(hereinafter "Pet."):

> At issue is whether the States can, without awaiting final judgment and appeal, challenge a habeas corpus petition as unauthorized. A State has an interest in the question because if it is forced into lengthy litigation on a petition, and that petition is subsequently declared null and void as being not authorized by the prisoner, the State may have to litigate a new petition, presumably one legitimately authorized by the prisoner. Pet. at 11.

Now, however, the Ninth Circuit has repeated its misstep in the instant case and has, in two published Orders, in the cases of Robert Edward Stansbury v. Arthur Calderon, No. 98-99004 (USDC No. CV 95-8532 WMB), an appeal case, and Calderon v. U.S.D.C. (Stansbury), No. 98-70733 (USDC No. CV 95-8532-WMB), a mandamus action, again ruled that the collateral order appeal doctrine of Cohen does not apply to the question of whether a petition is "authorized" and thus whether any litigation had thereupon will be valid, even where the state prisoner disavows the petition at the outset and also ruled in the mandamus action that there is no reason why the validity of a petition cannot be tested after all the time and expense of litigation.

As is set forth in the petition for certiorari, in the instant case, the counsel for the state prisoner, Clark, procured the prisoner's signature on a verification attached to one petition but filed it with a verification

attached to a petition which, inter alia, added additional claims. The counsel then attached counsel's own verification of the additional claims in the petition, admitting that the prisoner would, in all likelihood, refuse to verify the additional claims. After the Warden filed pleadings alerting the prisoner to what his counsel had done, the prisoner, permitted by the district court to file pleadings on the authorization question, disavowed the entire petition. The district court appointed new counsel for the prisoner but refused the Warden's demand that either a new properly authorized petition be substituted or that the prisoner verify the old petition. The Warden appealed to the Ninth Circuit who issued an ambiguous decision that could have been interpreted as holding that the collateral order appeal doctrine does not apply to an authorization question of this type. See Pet. at 4-8.

In Stansbury, the prisoner expressly approved of and filed a purported verification (although not under oath) of the guilt phase claims contained in his capital case petition for writ of habeas corpus. However, he specifically refused to verify those claims that challenged only the penalty phase of his conviction and stated in the purported verification that it was his wish to be executed if his guilt phase challenges were unsuccessful and therefore he was not authorizing the pursuit of the penalty phase claims in the petition. See Supplemental Appendix T.

The first Order of the Ninth Circuit in Stansbury reads:

> Prisoner Robert Stansbury moves to dismiss the Warden's appeal of the Order of the district court dated February 26, 1998. That order denied the Warden's Motion to Dismiss Stansbury's Petition for Writ of Habeas Corpus.

> The Warden's Motion to Dismiss was based on alleged deficiencies in the verification of the petition. After denying the motion to dismiss, the district judge declined the Warden's request to certify the Order for interlocutory appeal under 28 U.S.C. §1292(b).
>
> The district court's Order denying the motion to dismiss is not a final decision of the district court. It is an interlocutory order and therefore, not subject to immediate appellate review. 28 U.S.C. § 1291. No exception to the final judgment rule, such as the collateral order doctrine, applies. Gulfstream Arrow Space Corp. v. Mayacamas Corp., 485 U.S. 271 (1988); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). Therefore, this court lacks jurisdiction.
>
> Stansbury's Motion to Dismiss the appeal for lack of jurisdiction is granted. APPEAL DISMISSED. Supplemental Appendix R.

The Order in the mandamus action, which was based on the same facts reads:

> Warden Calderon petitions for a writ of mandamus challenging the district court's Order dated February 26, 1998 and seeking dismissal of the habeas proceeding pending in district court. The district court denied the Warden's Motion to Dismiss Stanbury's Petition for Writ of Habeas Corpus based on alleged deficiencies in the verification of the petition. After denying the motion to dismiss, the district judge declined the Warden's request to certify the Order for

interlocutory appeal under 28 U.S.C. §1292(b). Initially, the Warden sought appellate review. However, we dismissed the appeal for lack of jurisdiction. Prior to our dismissal of the appeal, the Warden filed this mandamus action.

A petition for writ of mandamus pursuant to 28 U.S.C. §1651 is an extraordinary writ. We consider five guidelines to determine whether to grant mandamus relief: (1) the party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires; (2) the petitioner will be damaged or prejudiced in a way not correctable onappeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and (5) the district court's order raises new and important problems or issues of law of first impression. Bauman v. United States District Court, 557 F.2d 650, 654-55 (9th Cir.1977).

The Warden's petition does not meet these factors. There is no indication that the issue cannot be raised on direct appeal after the habeas petition proceeds through district court. In addition, the Warden has not established that the district court's order is clearly erroneous, an oft-repeated error or that it raises new and important problems that should be considered outside of the normal appeal process. Thus, mandamus is not appropriate in this case.

PETITION FOR WRIT OF MANDAMUS DENIED.

As such, whereas the instant case once stood alone, it is now clear that the Ninth Circuit Court of Appeals has taken the position, in yet another case, the collateral order appeal in Stansbury, that even where the basic validity of the petition is at issue, an appeal complaining that the district court lacks jurisdiction to entertain an "unauthorized" petition is too premature to satisfy the collateral order appeal doctrine of Cohen.

Moreover, although the Warden, the petitioner in the instant case, did not appeal the denial of his mandamus action as to Clark, the wording of the Ninth Circuit in denying the mandamus action in Stansbury reiterates, eludicates and leaves no doubt as to the reasoning process in which the Ninth Circuit engaged in denying the collateral order appeals in Clark and Stansbury. It clearly states, chillingly, that there is no reason why the parties should be allowed to litigate the validity of a habeas petition before they go through the time and expense of a civil action.[2/]

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2. In so doing, they ignore the language of the second prong in Bauman, their own case, that mandamus may be proper where the mandamus seeker will be damaged in a manner not correctable on appeal.

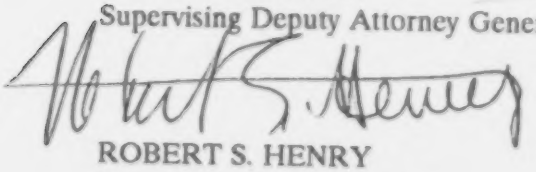
CONCLUSION

For the aforestated reasons, the Warden respectfully prays that the petition for certiorari be granted and, after a hearing or by a *per curiam* decision, the Court of Appeals for the Ninth Circuit be ordered to reinstate the collateral order appeal or, if this Court finds that the Ninth Circuit decision was on the merits, this Court grant a hearing to determine whether a petition can be "authorized" where an indigent state prisoner so objects to part of its contents that he disavows it.

Dated: August 19, 1998.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
KEITH H. BORJON
Supervising Deputy Attorney General



ROBERT S. HENRY
Deputy Attorney General
Counsel of Record

Counsel for PETITIONER

SUPPLEMENTAL APPENDIX R

FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT EDWARD STANSBURY,	No. 98-99004
Petitioner-Appellee,	D.C.No.CV 95-8532-WMB
v.	
ARTHUR CALDERON, Warden of the California State Prison at San Quentin,	ORDER
Respondent-Appellant	

Appeal from the United States District Court
for the Central District of California
William Matthew Byrne, District Judge, Presiding
Filed August 5, 1998

Before: Chief Judge HUG, FARRIS and SILVERMAN, Circuit Judges.

Prisoner Robert Stansbury moves to dismiss the Warden's appeal of the Order dated February 26, 1998. That order denied the Warden's Motion to Dismiss Stanbury's Petition for Writ of Habeas Corpus. The Warden's Motion to Dismiss was based on alleged deficiencies in the verification of the petition. After

denying the motion to dismiss, the district judge declined the Warden's request to certify the Order for interlocutory appeal under 28 U.S.C. § 1292(b).

The district court's Order denying the motion to dismiss is not a final decision of the district court. It is an interlocutory order and therefore, not subject to immediate appellate review. 28 U.S.C. § 1291. No exception to the final judgment rule, such as the collateral order doctrine, applies. Gulfstream Arrow Space Corp. v. Mayacamas Corp., 485 U.S. 271 (1988); Cohen v. Beneficial Indus. Loan Corp., 337 U.s. 541 (1949). Therefore, this court lacks jurisdiction.

Stansbury's Motion to Dismiss the appeal for lack of jurisdiction is granted. APPEAL DISMISSED.

COUNSEL

Paul M. Roadarmel, Jr., Deputy Attorney General, Los Angeles, California for the respondent-appellant.

Harry Simon, Deputy Federal Public Defender, Los Angeles, California for the petitioner-appellee.

SUPPLEMENTAL APPENDIX S

FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARTHUR CALDERON, Warden, Warden of the California State Prison at San Quentin, *Petitioner*,	]	No. 98-70733
v.	]	D.C. No.
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, *Respondent*,	>	CV 95-8532-WMB
	]	**ORDER**
ROBERT EDWARD STANSBURY, *Real Party in Interest.*	]	

Petition for Writ of Mandamus to the
United States District Court
for the Central District of California
William Matthew Byrne, District Judge, Presiding

Filed August 13, 1998

Before: Procter Hug, Jr., Chief Judge, Jerome Farris and Barry G. Silverman, Circuit Judges.

COUNSEL

Paul M. Roadarmel, Jr., Deputy Attorney General for the State of California, Los Angeles, California, for the petitioner.

ORDER

Warden Calderon petitions for a writ of mandamus challenging the district court's Order dated February 26, 1998 and

seeking dismissal of the habeas proceeding pending in district court. The district court denied the Warden's Motion to Dismiss Stanbury's Petition for Writ of Habeas Corpus based on alleged deficiencies in the verification of the petition. After denying the motion to dismiss, the district judge declined the Warden's request to certify the Order for interlocutory appeal under 28 U.S.C. §1292(b). Initially, the Warden sought appellate review. However, we dismissed the appeal for lack of jurisdiction. Prior to our dismissal of the appeal, the Warden filed this mandamus action.

A petition for writ of mandamus pursuant to 28 U.S.C. §1651 is an extraordinary writ. We consider five guidelines to determine whether to grant mandamus relief: (1) the party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires; (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and (5) the district court's order raises new and important problems or issues of law of first impression. *Bauman v. United States District Court*, 557 F.2d 650, 654-55 (9th Cir. 1977).

The Warden's petition does not meet these factors. There is no indication that the issue cannot be raised on direct appeal after the habeas petition proceeds through district court. In addition, the Warden has not established that the district court' s order is clearly erroneous, an oft-repeated error or that it raises new and important problems that should be considered outside of the normal appeal process. Thus, mandamus is not appropriate in this case.

PETITION FOR WRIT OF MANDAMUS DENIED.

SUPPLEMENTAL APPENDIX T

DECLARATION OF ROBERT E. STANSBURY

I, Robert E. Stansbury, declare as follows:

I have received the Amended Federal Habeas Corpus Petition that my attorneys have represented to me they will be filing on my behalf. I authorize my attorneys to proceed on the guilt phase claims contained in my Amended Petition. I refuse penalty phase relief, and I want such relief barred since I do not want a "Life Without Possibility of Parole" sentence. I reserve the right to end the appeal at any time and seek the death penalty.

/S/
ROBERT E. STANSBURY